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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 228

SAFEWAY TRAILS, INC., a Corporation of the State of Maryland,

Appellant,

vs.

DAVID D. FURMAN, Attorney General of the State of New Jersey and Head of the Department of Law and Public Safety; NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles; and JOHN A. KERVICK, State Treasurer of New Jersey,

Respondents.

On Appeal from the Supreme Court of the State of New Jersey

MOTION TO DISMISS WITH BRIEF IN SUPPORT THEREOF

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No. _____

SAFEWAY TRAILS, INC., a Corporation of the State of Maryland,

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DAVID D. FURMAN, Attorney General of the State of New Jersey and Head of the Department of Law and Public Safety; NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles; and JOHN A. KERVICK, State Treasurer of New Jersey,

Respondents.

On Appeal from the Supreme Court of the State of New Jersey

Motion to Dismiss

Pursuant to Rule 16(5) of this Court, the Attorney General of the State of New Jersey, on behalf of the State of New Jersey, moves to dismiss this appeal on the ground that it does not present a substantial Federal question.

Opinion Below

The opinion from which appellant appeals to this Court is that of the Supreme Court of New Jersey, decided February 3, 1964, reported in 41 N. J. 467, 197 A. 2d, 366 (1964), reversing a judgment of the Superior Court of New Jersey, decided July 31, 1962, reported in 76 N. J. Super. 90, 183 A. 2d 788 (Law Div. 1962).

Questions Presented

1. Does the inclusion of the New Jersey Turnpike within the term "highways in the State" under the New Jersey Highway Use Tax, R.S. 48:4-20, N.J.S.A. as applied to mileage traversed by interstate autobuses constitute invidious or unreasonable discrimination contrary to the Fourteenth Amendment?

2. Does the inclusion of the New Jersey Turnpike within the term "highways in the State" under the New Jersey Highway Use Tax, R.S. 48:4-20, N.J.S.A. as applied to mileage traversed by interstate autobuses constitute an undue burden against interstate commerce contrary to the Commerce Clause, Article I, Section 8, Clause 3 of the Federal Constitution?

Statement of the Case

A. Proceedings below

Appellant is a Maryland corporation authorized to do business in New Jersey. It was one of several plaintiffs appearing in consolidated actions brought in the New Jersey State Courts. All of the plaintiffs below, including appellant, were common carriers of passengers by motor buses, operating their motor buses over the highways in the State of New Jersey on both interstate and intrastate journeys. Appellant is engaged in the interstate trans-

poration of passengers pursuant to certificates issued by the Interstate Commerce Commission. Appellant and other plaintiffs travel extensively over either the New Jersey Turnpike or the Garden State Parkway as well as other highways in the State of New Jersey.

The defendants in these consolidated actions were the Attorney General of the State of New Jersey, the Director of the Division of Motor Vehicles of the Department of Law and Public Safety of New Jersey and the Treasurer of the State of New Jersey.

One of the actions was instituted by plaintiff bus companies in the Appellate Division of the Superior Court by way of a petition for declaratory judgment; another action was instituted in the Chancery Division of the Superior Court for injunctive relief. A third action was instituted by appellant Safeway Trails, Inc. in the Law Division of the Superior Court by way of a complaint in lieu of prerogative writ. All three actions were consolidated and remanded to the Law Division of the Superior Court for trial. There was a trial before this Court which lasted several days. Over 12 witnesses were produced and testified, and almost 30 documentary exhibits were offered in evidence. The record made at this trial constituted the record on appeal before the New Jersey Supreme Court.

B. The tax statutes involved

The plaintiff, as well as other common carriers of passengers similarly situated, are required to pay various excise and franchise taxes to the State of New Jersey and to municipalities. Common carriers of passengers which operate motor-buses in any municipality are required to pay 3% of gross receipts "as a monthly franchise tax for the use of the streets, which tax is in lieu of all other franchise taxes and municipal license fees", R.S. 48:4-14,

N.J.S.A., as amended, L. 1961, c. 127. Common carriers of passengers which operate over any highway in this State on an interstate journey are required to pay "as an excise for the use of such highway" a tax computed on the basis of one-half cent for each mile or fraction thereof operated by such carriers over the highways of this State. (R.S. 48:4-20, N.J.S.A.). Such common carriers are also subject to the tax imposed by R.S. 54:39-1 *et seq.*, as amended, based upon the sale of motor fuels "for the purpose of generating power for the propulsion of motor vehicles upon the public highways".

Under R.S. 48:4-20, N.J.S.A., it is provided that no excise tax shall be payable by the interstate common carrier for mileage traveled by such carrier in any municipality to which it has paid the monthly franchise tax for the use of streets under R.S. 48:4-14, N.J.S.A. It is further provided under R.S. 48:4-15, N.J.S.A., that all moneys paid by a common carrier as fees for licensing or registration or as a tax on the use or sale of motor fuels in its operation in any municipality or as any other tax or fee under any law of this State imposed upon such carrier or its operations, with the exception of taxes upon personal property, shall be considered a credit on account of or in full, for the municipal franchise tax imposed by R.S. 48:4-14, N.J.S.A. Under the motor fuels sales tax, a common carrier is entitled to a refund for taxes paid upon motor fuels where such common carrier uses motor fuels "while being operated over the highways of this State in those municipalities to which [it] has paid a municipal franchise tax for the use of the streets therein * * *," R.S. 54:39-66 (1) (b); N.J.S.A., as amended. A common carrier paying an excise tax under R.S. 48:4-20, N.J.S.A. is entitled to credit or offset with respect to mileage travelled over municipal streets as to which a gross receipts tax was paid.

C. The New Jersey Turnpike and the Garden State Parkway.*

(1) Description

Provision for the creation of the Turnpike was made by N.J.S.A. 27:23-1 *et seq.*; it became available to the public in the latter part of 1951. The Garden State Parkway was established pursuant to N.J.S.A. 27:12B-1 *et seq.* and became available to the public in the summer of 1954. Each of these highways was created in order to facilitate vehicular traffic and to remove the then existing handicaps and hazards on the congested highways in the State and to provide a modern express highway with current safety features, including center divisions, ample shoulder widths, long-sight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads.

Common carriers utilizing the Turnpike and Parkway derive substantial economies by utilizing these routes. For example, the Turnpike is shorter than alternate State routes which a carrier might otherwise take to accomplish the same journey. There are 123 traffic lights on these alternate routes, and a carrier can complete a journey on the Turnpike in substantially less time than the same trip on alternate routes. Both the Turnpike and Parkway are safer routes than other comparable State highways, and a com-

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* Actually the appellant itself in traveling through New Jersey utilizes various public highways in New Jersey including the New Jersey Turnpike; it does not travel over the Garden State Parkway. Other plaintiffs in the consolidated actions below, however, utilize the Garden State Parkway as well as the New Jersey Turnpike. Both routes are public toll roads and are similar in many respects. Since both were considered in the appeal before the New Jersey Supreme Court, a more accurate presentation of the issues before this Court reasonably requires reference to the Garden State Parkway as well as the New Jersey Turnpike.

mercial carrier using the Turnpike and Parkway experiences considerably less interference with its journeys as a result of accidents on these roads than might be the case if they traveled on other comparable highways.

(2) Governmental control and financing.

These highways are operated and controlled by the New Jersey Highway Authority and the New Jersey Turnpike Authority, respectively. Each Authority was established in the State Highway Department and each constituted "an instrumentality exercising public and essential governmental functions," whose operations "shall be deemed and held to be an essential governmental function of the State."

The Turnpike Authority and the Highway Authority, are to some degree "independent" of the State of New Jersey, but they function very closely with other agencies of State government. For example, the Turnpike Authority operates cooperatively with the State of New Jersey in safety programs. It also occasionally utilizes the facilities and personnel of the State Highway Department and the Division of Purchase and Property. It frequently sells property to the State of New Jersey and, although it seeks to obtain a fair price for the property, it does not receive competitive bids for the purpose of receiving the highest obtainable price. It cooperates with the State in order to enable the State to acquire its surplus property at a reasonable price. Real estate transactions between the Turnpike Authority and the State of New Jersey apparently do not vary in any substantial respect from similar transactions between other State departments or agencies. Its employees are considered to be State employees for pension fund purposes.

These authorities operate their roads and related projects financed by the proceeds of bonds or notes issues to

the public. Their operations are designed to be financially self-liquidating, and they are authorized, and do, charge reasonable tolls for that purpose. The State Highway Department exercises certain control over the construction of the Turnpike. Although the State cannot pledge its credit for the purpose of Parkway or Turnpike operations, the State has pledged and agreed with the holders of the bonds or notes issued by the Authorities that it will not in any way impair the ability of the Authorities to operate their projects and to collect such tolls necessary to produce sufficient revenues to meet the expense of maintenance, operation and their obligations under their bonds or notes. The State has, moreover, guaranteed the punctual payment of the Parkway Authority bonds and has provided for the funding of this guaranty. It is further contemplated that upon the payment of its bonds and notes, the roads operated by the Turnpike Authority shall come under the direct control of the State Highway Department. It is similarly recognized that the property and roads of the Parkway Authority are held for the State.

(3) State expenses and burdens

The State of New Jersey directly operates and maintains certain portions of the Garden State Parkway and incurs direct costs and expenditures in this connection. Additionally, the State of New Jersey incurs many diverse expenses engendered by the public use of the New Jersey Turnpike and Garden State Parkway. These expenses arise as part of the State's overriding jurisdiction and control over these highways. These expenses are not reimbursed to the State by the Turnpike Authority or Highway Authority. For example, the Division of State Police incurs many expenses in connection with the enforcement of its drunk drivers program; its enforcement of criminal laws through detectives assigned to both roads; its supplementary training

of troopers assigned to both roads; its overhead and administrative expenses in connection with personnel problems and the issuance of summonses; the operation of its laboratories and scientific facilities and equipment; the operation of its extensive communications system which is tied into the Turnpike and Parkway; and its conduct of fatal accident investigations. The Department of Law and Public Safety incurs expenses when the Attorney General becomes involved in litigation arising out of violations occurring on the New Jersey Turnpike and Garden State Parkway. The Division of Motor Vehicles also has costs in connection with the enforcement of its various traffic safety programs which cover the Turnpike and Parkway, such as its fatal accident program, its excessive speed program, 29% of which involves violations on the Turnpike and Parkway; the administration of the point system; its program of reporting accidents, reporting summonses and violations and its administration of the New Jersey Security Responsibility Law. The State Highway Department has incurred various expenses engendered by the public use of the Turnpike and Garden State Parkway and is presently devoting time, personnel and resources to planning and development in connection with the Turnpike and Parkway. Likewise, other State agencies are not reimbursed in connection with their activities as related to and made necessary by the public use of the Garden State Parkway and New Jersey Turnpike.

D. The decision of the New Jersey Supreme Court

(1) Issues

The Supreme Court of New Jersey stated that two questions were involved in this litigation: first, whether mileage traveled over the New Jersey and Garden State Parkway by interstate autobuses should be included in the computation of the excise tax imposed by N.J.S.A. 48:4-20 as a

matter of statutory construction; and second, if so, whether the imposition of the tax violates the Commerce Clause of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment (A30a).

(2) "Highways" include Turnpike and Parkway as matter of statutory construction.

The Court held that the New Jersey Turnpike and Garden State Parkway were "highways" within the meaning and intendment of N.J.S.A. 48:4-20 and mileage traversed over these roads by interstate autobuses should therefore be included in the computation of the excise tax. It determined initially that the term "any highway" as used in N.J.S.A. 48:4-20 was broad enough to include the Turnpike and Parkway, that the tax imposed was intended to be compensatory in a broad and general sense, since it is levied at a flat rate of one-half cent per mile traveled on *any* highway in the State and that this mileage formula was "but an averaging device intended to result in fair compensation for the average trip by the average interstate user over an average-cost road" and that it was thus intended to compensate the State for providing a complete network of highways. The Court found that the State of New Jersey incurs many expenses made necessary by the Turnpike and Parkway which expenses are not reimbursed to the State by the respective Authorities. The Court also observed that the Turnpike Authority and Highway Authority cannot be equated to private companies operating toll roads and since these Authorities are instrumentalities and agencies of the State and, in effect, are "arms of the State government operating certain highways for the State".

(3) There is no violation of Equal Protection or Commerce Clauses of U. S. Constitution.

With respect to the constitutional issues, the New Jersey Supreme Court rejected the arguments which appellant seeks to raise here. The Court below held that tolls paid for travel over the Turnpike, plus the excise tax do not exceed "fair compensation to the State" because in fact a different privilege is granted by each levy. The Court observed that the excise tax is imposed to require interstate autobuses to bear their fair share of taxation, i.e. to contribute to highway construction, maintenance and policing costs, whereas the toll is in the nature of a special levy for the use of a special facility, in the nature of luxury roads, intended to compensate the Authority (and indirectly the State) for cost of construction, maintenance and operation of the particular roads. It further observed that the Turnpike and Parkway do not exist in a vacuum but are two roads in a network of New Jersey Highways available to and used by interstate autobuses and their interrelationship with the rest of the New Jersey Highway System involves burdens to the State for which interstate autobus operators, using these toll roads, can be asked to contribute their fair share.

The Court determined that the excise tax was not excessive on the theory that it bears no reasonable relationship to the privilege granted. It correctly held that a tax for the use of highways need not bear any specific relationship to the extent of road use; it suffices if the formula results in a rough approximation of fair compensation. It again emphasized the many expenses incurred by the State of New Jersey in connection with the use of the Turnpike and Parkway and other expenses in the administration of its road laws in connection with toll road use and that it was immaterial that the particular road used by the taxpayer do not derive a direct benefit from the tax imposed for its use.

The Court also rejected appellant's argument that the tax discriminates against interstate commerce in favor of intrastate commerce. Appellant asserted below (as it attempts to do here) that it pays all taxes paid by intrastate carriers but, in addition, pays the excise tax imposed by N.J.S.A. 48:4-20. The Court pointed out, however, that intrastate autobuses pay a gross receipts tax for the privilege of intrastate operation levied under N.J.S.A. 48:4-14, and that there was no proof indicating that the gross receipts tax results in a lesser burden than the mileage tax imposed under N.J.S.A. 48:4-20. Moreover, an interstate operator also engaged in an intrastate operation and thereby subject to the gross receipts tax is entitled to obtain full credit on the mileage tax for all miles subject to the gross receipts tax.

Summary of Argument

Appellant does not contend before this Court that the New Jersey Supreme Court erroneously construed the New Jersey statute, N.J.S.A. 48:4-20, which imposes an excise tax at the rate of one-half cent per mile upon interstate autobuses for mileage traversed over the "highways in the State," to include the New Jersey Turnpike and Garden State Parkway. This is admittedly a question solely of state law and of itself involves no federal question. Appellant's assertions are that the New Jersey tax statute, as construed and applied, constitutes "a discriminatory levy on interstate commerce" (Jurisdictional Statement, p. 10). It also asserts that "the Supreme Court of New Jersey made no attempt to demonstrate the reasonableness of the classification" (Jurisdictional Statement, p. 13). And "the classification exempting intrastate autobuses from paying a mileage tax for miles operated over the Turnpike has no reasonable basis", and the payment of such a tax by appellant is a denial of "the equal protection of the laws in violation of the Fourteenth Amendment of the Constitu-

tion of the United States" (Jurisdictional Statement, p. 14). Appellant further urges that "the application of this mileage tax to miles traveled on the New Jersey Turnpike, with respect to which the State is prohibited by law from making expenditures * * * is both unreasonable and discriminatory, constituting a burden on interstate commerce in violation of the Commerce Clause" (Jurisdictional Statement, p. 14).

The State of New Jersey argues herein that the New Jersey Highway Use Tax, considered in context, involves no unreasonable classification as between interstate autobuses and intrastate autobuses and involves no invidious discrimination against interstate buses. No unreasonable classification or invidous discrimination is discernible from an examination of the statutes involved nor did appellant or any of the plaintiffs in the consolidated actions before the New Jersey courts demonstrate that the taxing statutes in application and in practice resulted in discriminatory burdens. In actuality the tax imposed by N.J.S.A. 48:4-20 upon interstate autobuses is reasonably designed to assure tax equality and parity as between all autobuses using highways in the state and is not a denial of equal protection.

It is further argued herein that the Highway Use Tax, construed to include in its computation mileage traversed over the New Jersey Turnpike and Garden State Parkway, does not constitute an undue or unreasonable burden on interstate commerce. It is pointed out that the tax in question is for the privilege of using highways in the State of New Jersey and is reasonably and broadly compensatory as to state expenditures and needs in maintaining its highway system; the imposition of a specific toll for the use of such roads in no way militates against the imposition of the general Highway Use Tax and does not constitute double taxation since the toll is a special payment for specific

economies and benefits, designed to defray direct expenses for the operation and maintenance of a particular road.

For these reasons it is respectfully submitted that appellant has raised no substantial federal question which would warrant this appeal and that the appeal should, therefore, be dismissed.

ARGUMENT

POINT I

The New Jersey Highway Use Tax does not constitute unconstitutional discrimination against interstate commerce merely because mileage traversed over the New Jersey Turnpike and Garden State Parkway is included in the computation of the tax in addition to mileage traveled over all other state highways.

Appellant cites several cases of this Court, decided during the 1930's, for the proposition that a tax statute cannot be predicated upon unreasonable or arbitrary classifications. There is no quarrel with this basic axiom nor are the holdings of these cases in any way disputed. The cited cases involved statutes according different tax treatment for different types of users of State highways or roadways, *i.e.*, agricultural products hauled by owners as distinguished from commercial common carriers. In each case the question was whether or not the distinctions were in any sense reasonable. The decisions are clearly and patently distinguishable from the instant case.

In the case *sub judice* appellant asserts that an unreasonable classification is wrought by the Highway Use Tax because intrastate autobuses are "exempted" from paying a mileage tax for miles operated over the Turnpike (Jurisdictional Statement, p. 14). The premise from which ap-

pellant reasons is not founded. Appellant neglects to point out that the Highway Use Tax, N.J.S.A. 48:4-20, which is applicable to interstate autobuses, is one of several taxes applicable to highway use and that intrastate autobuses—or for that matter interstate autobuses performing intrastate journeys—are subject to a comparable tax under N.J.S.A. 48:4-14, the gross receipts franchise tax. And, indeed, there is no factual proof whatsoever that an autobus making an intrastate journey and utilizing the New Jersey Turnpike or Garden State Parkway would not, in fact, pay the municipal gross receipts franchise tax to the municipalities through which it operated including mileage travelled on these public toll roads.

It is clear that autobuses in intrastate commerce pay taxes for this privilege. R.S. 48:4-14. It is of no moment that these taxes are paid to municipalities. Municipalities are political subdivision of the State. *State* v. *Lanza*, 27 N. J. 516 (1958), *appeal dismissed*, 358 U. S. 333, 79 S. Ct. 351 (1959). Moreover the gross receipts tax paid to municipalities under R.S. 48:4-14 is applicable to *all* roads in the municipality traversed by intrastate carriers in connection with the pickup, transportation and discharge of passengers even though such roads may not be directly under the jurisdiction or control of the municipalities. *Cf. Patapsco Electric Co.* v. *Mayor, etc. of the City of Baltimore*, 110 Md. 306, 72 A. 1039, 1041 (Ct. of App. 1909). There was no evidence adduced to show that taxes paid by intrastate autobuses under R.S. 48:4-14 are less than taxes paid by interstate autobuses under R.S. 48:4-20. While there are undoubtedly some autobuses that traverse the Garden State Parkway and New Jersey Turnpike on journeys which are completely within the State of New Jersey and therefore intrastate, there was no showing as to whether or not the taxes paid by such intrastate autobuses to municipalities wherein they pick up and discharge passengers along

or off of the Garden State Parkway and New Jersey Turnpike are less than the taxes paid by an interstate autobus using the Turnpike and Parkway under R.S. 48:4-20. Moreover, the testimony indicated that interstate autobuses utilizing the Turnpike and Parkway are entitled to and do obtain a credit against the tax imposed under R.S. 48:4-20 for any municipal gross receipts tax which they pay under R.S. 48:4-14. The New Jersey Supreme Court considered this very argument and found on the basis of the record no patent or invidious discrimination against interstate commerce and no unreasonable or arbitrary classification.

POINT II

The New Jersey Highway Use Tax as applied to include mileage traversed by interstate autobuses over the New Jersey Turnpike and Garden State Parkway does not constitute an unreasonable or undue burden on interstate commerce.

Appellant argues that it is subjected to "double taxation" in that it must pay both an excise tax measured by mileage traveled over the New Jersey Turnpike and a toll for its use of this road. It asserts that these payments are not reasonably related to any expenses of the State and therefore cannot be considered as compensatory use taxes and are for this reason, an unreasonable and undue burden on interstate commerce.

It cannot be asserted successfully, however, that the payment of tolls for the use of the New Jersey Turnpike or Garden State Parkway, in addition to the excise tax imposed by R.S. 48:4-20 based upon mileage traveled upon these highways, results in an undue burden contrary to the Commerce Clause or for that matter a denial of equal protection contrary to the Constitution. It has been recognized

that tolls are not taxes. *People* v. *Schommer*, 392 Ill. 17, 63 N. E. 2d 744 (Sup. Ct. 1945); *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288, 8 S. Ct. 113 (1887); *In re Opinion of the Justices*, 81 N. H. 552, 120 A. 629 (Sup. Ct. 1923); *Bode* v. *Barrett*, 412 Ill. 204, 106 N. E. 2d 521 (Sup. Ct. 1952); *aff'd*, 344 U. S. 583, 73 S. Ct. 468 (1953); *Rogge* v. *U. S.*, 128 Fed. 2d 800, 802 (9th Cir. 1942) *cert. denied*, 317 U. S. 656, 63 S. Ct. 54 (1942). Similarly, an excise tax for the use of the highways of a state cannot be considered "tolls." *State* v. *City Bus Co.*, 176 Miss. 597, 169 So. 744 (Sup. Ct. 1936), *appeal dismissed*, 299 U. S. 520, 57 S. Ct. 323 (1937), *appeal reinstated and dismissed*, 300 U. S. 639, 57 S. Ct. 506 (1937); *Tirrell* v. *Johnston*, 86 N. H. 530, 171 A. 641 (Sup. Ct. 1934), *affirmed*, 293 U. S. 533, 55 S. Ct. 238 (1934); *Carley & Hamilton, Inc.* v. *Snook*, 281 U. S. 66, 50 S. Ct. 204 (1930).

There is no legal equation or correlation between the tolls paid for the use of the Garden State Parkway and the New Jersey Turnpike and the excise tax paid under R.S. 48:4-20 including miles traveled over the highways. Therefore, it cannot be contended that the payment of both the tolls and the excise tax results in double taxation. *Cf. O'Brien* v. *State Tax Commission*, 339 Mass. 56, 158 N. E. 2d 146 (S. J. C. 1959); *Select Base Materials, Inc.* v. *Board of Equalization*, 51 Cal. 2d 640, 335 P. 2d 672, 677 (Sup. Ct. 1959). As stated in *McLean Trucking Co.* v. *City of New York*, 202 Misc. 604, 116 N. Y. S. 2d 292, 297 (Sup. Ct. 1952), "neither is the tax invalidated by the fact that it is in addition to other taxes paid by the interstate carrier." *Interstate Buses Corp.* v. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230 (1928).

In *Shirks Motor Express Corp.* v. *Messner*, 375 Pa. 450, 100 A. 2d 913 (Sup. Ct., 1953), *appeal dismissed, sub nom.*,

Interstate Motor Freight System v. *Messner*, 347 U. S. 941 (1954), the taxpayer, an interstate carrier contended that the application of the Pennsylvania Highway use tax as applied to mileage traveled by it over the Pennsylvania Turnpike constituted a denial of equal protection under the United States Constitution. The taxpayer specifically contended that "a carrier who [*sic.*] uses the Turnpike for a given number of miles of his operation must pay a toll in addition to the tax, where another carrier who operates for an equal number of miles but does not use the Turnpike pays only the tax, and therefore there is lack of uniformity in the operation of the tax." The Supreme Court Pennsylvania rejected this argument stating:

> "The Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth. Act of May 21, 1937, P. L. 744, § 4, 36 P. S. § 652d. The Turnpike is one of the public highways which cross the State of Pennsylvania in the same general locality. Two others are the William Penn Highway and the Lincoln Highway. No motor carrier is restricted to the use of the Turnpike to the exclusion of either of such other two routes. If a motor carrier voluntarily chooses to use the Turnpike because of more economic and efficient operation, such voluntary choice can not provide the foundation for a constitutional argument. The choice is obviously made because the amount of the toll is less than savings in operations resulting from a shorter route, few and very slight grades which make it possible to carry loads up to the legal limit, absence of intersections and savings in fuel and time. Appellant Interstate has not shown that the tax plus the toll exceeds fair compensation for its use of the Turnpike. A taxpayer can not voluntarily assume a burden and then be heard to say that it is unconstitutional. There is no merit in this contention." 100 A. 2d at page 918.

This Court dismissed the appeal in this case because it did not involve a substantial federal question.

This Court has made it clear that a tax upon interstate carriers will be sustained if it is designed in a broad and general sense to produce fair compensation to the State for the use of its highways. *Capital Greyhound Line* v. *Brice*, 339 U. S. 542, 70 S. Ct. 806 (1950); *cf. Kane* v. *State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30 (1916); *Bode* v. *Barrett, supra.*

Appellant contends that the tax involved is not "fair compensation" because the tax proceeds are not applied to the turnpike.* A tax imposed for the use of highways of a state is not invalidated merely because the proceeds thereof are not actually appropriated or used for highway repair, maintenance, operation and the like. *Morf* v. *Bingaman*, 298 U. S. 407, 56 S. Ct. 756 (1936); *Aero Mayflower Transit Co.* v. *Bd. of Railroad Comm'rs.*, 332 U. S. 495, 68 S. Ct. 167 (1947); *Dixie Ohio Express Co.* v. *State Revenue Comm.*, 306 U. S. 72, 59 S. Ct. 435 (1939). Nor must the roads, the use of which gives rise to the tax, be the direct recipients of the proceeds thereof. *Cf. Savage Truck Line* v. *Commonwealth*, 193 Va. 237, 68 S. E. 2d 510 (Sup. Ct. of App., 1952); *State* v. *Evans-Terry Co.*, 173 Miss. 526, 159 So. 658 (Sup. Ct. 1935), *affirmed*, 296 U. S. 538, 56 S. Ct. 126 (1935); *Dixie Ohio Express Co.* v. *State Revenue Comm., supra; McLean Trucking Co.* v. *City of New York*, 202 Misc. 604, 116 N. Y. S. 2d 292 (Sup. Ct. 1952); *Mid-State Freight Lines* v. *Bates*, 279 App. Div. 451, 111 N. Y. S. 2d 578 (App. Div. 1952), *affirmed*, 304 N. Y. 700, 107 N. E. 2d 603 (Ct. of App. 1952), *cert. denied*, 345 U. S. 908, 73 S. Ct. 648 (1953).

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* Actually the State of New Jersey directly constructs, maintains and operates certain sections of the Garden State Parkway. And, as found by the New Jersey Supreme Court and discussed *infra*, the State incurs many expenses attributable to the public use of both the New Jersey Turnpike and Garden State Parkway.

The record below amply demonstrates and the New Jersey Supreme Court specifically found that the State of New Jersey incurs a great many diverse expenses made necessary by the extensive public use of the New Jersy Turnpike and Garden State Parkway. These expenses are over and above those incurred by the Turnpike Authority and Highway Authority, respectively, for their construction, operation and maintenance of their roads for which they receive tolls. It has not been established that the imposition of the half penny tax under R.S. 48:4-20 is unreasonable or disproportionate with respect to such State expenditures.

POINT III

There exists no substantial federal question on this appeal since it has not been demonstrated that the New Jersey Highway Use Tax denies appellant equal protection of the law or constitutes invidious discrimination against interstate autobuses or imposes an unreasonable or confiscatory burden upon interstate commerce.

Petitioner has not demonstrated that the tax imposed under N.J.S.A. 48:4-20 is discriminatory with respect to interstate commerce and constitutes, therefore, a denial of equal protection guaranteed by the Fourteenth Amendment. The New Jersey Supreme Court specifically rejected this contention. The State Supreme Court stated as follows:

> "* * * Our examination of the record indicates that this tax is paid only when the interstate operator has elected to do an intrastate business concurrent with his interstate journey, in which case he pays the same tax as the intrastate carrier, *i.e.*, 3% of his gross receipts collected in intrastate commerce. Moreover, an interstate operator who is also engaged in an intrastate

operation, and thus subject to the gross receipt ta , may deduct from the miles traveled on the interstate journey (and subject to the ½ cent mileage tax) those miles he operates within the municipality and upon which he is paying the gross receipts tax. In other words, full credit is allowed on the mileage tax for all miles subject to the gross receipts tax.

"Since intrastate carriers are taxed under N.J.S.A. 48:4-14 for the use of highways and since the interstate operator does not pay this tax unless he elects to do a concurrent intrastate business, and in the absence of proof that in actual practice the tax imposed on the plaintiffs is more burdensome than that imposed on intrastate carriers, we conclude that N.J.S.A. 48:4-20 does not discriminate against interstate autobus operators in favor of intrastate autobus operators." (A45a; 41 N. J. at p. 491.)

Appellant has also failed to demonstrate that the imposition of this tax as applied to it constitutes an unreasonable or undue burden on interstate commerce. The State Supreme Court rejected the "double taxation" theory as already demonstrated. It stated:

"Moreover, the tax does not fall as 'double taxation,' as urged by the plaintiffs, because a toll is also charged for use of the roads. The State may lay more than one tax for the privilege of road use. See *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551 (1928). The test is whether the taxes imposed result in an unreasonable amount in the aggregate. As was said in *Bode* v. *Barrett*, 412 Ill. 204, 106 N. E. 2d 521, 531 (Sup. Ct. 1952), affirmed 344 U. S. 583, 73 St. Ct. 468, 531, 97 L. Ed. 567 (1953): 'The proper test of constitutionality is whether or not the total

of excise taxes levied for the privilege of using State roads produces an amount which is shown to be in excess of fair or reasonable compensation to the State for such privilege.' There has been no showing that the total taxes paid by plaintiffs plus tolls paid for the Turnpike and Parkway exceed fair compensation for the use of State highways." (A43a; 41 N. J. at p. 488-489).

Appellant has failed to demonstrate that the tax even as computed to include mileage travel over the New Jersey Turnpike or Garden State Parkway, is an unreasonable burden and not designed to exact fair compensation. The New Jersey Supreme Court correctly held as follows:

> "A tax for the use of highways need not bear any specific relationship to the extent of road use. *Kane* v. *New Jersey, supra.* A mileage tax is normally considered to be *prima facie* compensatory because it is directly proportional to road use. But a formula not related to road use will be upheld unless the challenger shows that the result of the tax is an unreasonable burden on interstate carriers. *Capitol Greyhound Lines* v. *Brice, supra.* Because of the countless factors involved in determining fair compensation, it is enough if the formula results in a 'rough approximation' of fair compensation. 339 U. S. at p. 546, 70 S. Ct., at p. 809, 94 L. Ed., at p. 1057.
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> "As shown in Part I of this opinion, the State incurs many expenses in connection with the use of the Turnpike and Parkway. Subsidiary roads are high-cost roads to the State because of the traffic congestion thereon resulting from Turnpike and Parkway traffic. And the State incurs other expenses in the administration of its road laws in connection with toll road use.

The fact that the particular road used by the taxpayer does not derive a direct benefit from the tax imposed for its use does not affect the validity of the tax. See *Dixie Ohio Express Co.* v. *State Revenue Comm.*, 306 U. S. 72, 77, 59 S. Ct. 435, 437-438, 83 L. Ed. 495, 499 (1939). And the fact that the use of the Turnpike or Parkway may be less burdensome financially to the State (aside from the expenses of the respective authorities) than other highways in the State does not destroy the validity of the measure of the tax if the result of the tax is fair compensation to the State. As was said in *Hendrick* v. *Maryland*, 235 U. S. 610, 624, 35 S. Ct. 140, 142, 59 L. Ed. 385, 391 (1915), with respect to state taxes for road use:

> 'The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce.'

Here the tax is measured by the miles traveled within the State. The formula used in imposing the tax is not a measure of constitutionality so long as it may be deemed a reasonable exercise of legislative judgment. See *Brice*, *supra*, where Justice Black discusses the many and varied measures, e.g., chassis weight, tonnage capacity or horsepower, which have been upheld against constitutional attack. 339 U. S., at p. 544, 70 S. Ct., at p. 808, 94 L. Ed., at p. 1056. It is a reasonable exercise of legislative judgment that the amount of the tax due as a contribution from interstate bus users shall be measured by the miles traveled over all roads in the State." (A42a-43a; 41 N. J., at pp. 487-488).

The arguments urged by appellant lack merit and do not disclose any real or substantial federal questions. This Court has previously rejected similar arguments for lack of substantiality. *Shirks Motor Express Corp.* v. *Messner, supra* (and see also *Transamerican Freight Lines* v. *Commonwealth of Pennsylvania*, 396 Pa. 64, 151 A. 2d 630 (Sup. Ct., 1959), *cert. den.*, 361 U. S. 882 (1959) and *Sentle Trucking Corp.* v. *Bowers*, 173 O. St. 31, 179 N. E. 2d 346 (Sup. Ct., 1962)). There is no matter suggested in this appeal of sufficient substantiality to warrant the further attention of this Court and, therefore, it is respectfully urged that the within appeal be dismissed.

Respectfully submitted,

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